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ABSTRACT

The roots of the Bill of Rights, the first 10 amendments to the United States Constitution, are examined in this document. Attention is directed to English law, specifically the Magna Carta and England's Bill of Rights of 1689, as providing much of the underpinnings for the U.S. Bill of Rights. The text of 15 articles proposed by anti-federalists during the Constitutional ratification fight in Pennsylvania in 1787 is presented as the first draft of the Bill of Rights. This paper might be useful to secondary history or civics teachers and students who desire a brief summary on the history of the Bill of Rights. (DB)

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HOW THE BILL OF RIGHTS WAS DEVELOPED

by

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HOW THE BILL OF RIGHTS WAS DEVELOPED

by David V. Stivison, Esq.

December 15, 1991 will mark the two hundredth anniversary of the adoption of the Bill of Rights, the first ten Amendments to our Federal Constitution. Our Bill of Rights did not appear magically from thin air. Those who demanded it, constructed it, and adopted it knew what they were doing. Many of them had served in state constitutional conventions and had created new governments from scratch at the end of the Revolutionary War. What raw materials did they have at hand when they set to work to build a new order, something combining the very best designs from all that had gone on before?

Much of the framework was English. We take that for granted. We shouldn't. The normal rule for new British territories was that they would retain the law in effect when they were "conquered" (which, in America, was believed to be no law), plus what British acts and statutes as were specifically made applicable to the new territory. For many areas here, the process was exactly reversed. British law, in its entirety, would apply in the American colonies, and only if there was a specific exclusion would we be exempt. That was a bargained-for exchange. It was a concession to proprietors and colonizers to help entice new settlers to move here. They would be living as much under the familiar British law as if they stayed at their homes in England.

THE ISRAELI EXPERIENCE

To see the "normal" way of proceeding, we can look at Palestine and Israel. When Britain accepted the mandate to govern "Palestine" in 1917, that territory had formerly been part of the Ottoman Empire. Its law in 1917 was Ottoman law, since entirely replaced by legislation. Section 46 of Provisional Order in Council 1922 established British law and equity as law in Palestine, but only to the extent consistent with the range of English jurisdiction and as modified by the dictates of local necessity.

That basis, plus the laws enacted in Palestine from 1917 to 1948, formed the law at the time of the Declaration of the Establishment of the State of Israel on May 14, 1948. That Declaration specified that a Constitution be adopted by October, 1948, an expectation not fulfilled to this day. It soon became clear that many did not want a written constitution at all. A piecemeal approach was chosen and by resolution of 13 June 1950, the Israeli Parliament, the Knesset, resolved that a constitution would be built up chapter by chapter. To date, nine such chapters have become basic law, but a Bill of Rights is not among them. In fact, Basic Law (1980) substituted references to principles of Jewish Traditional Law for the reliance on English principles.

This is a path that America might have trod, if the earliest settlers had not been so insistent on full applicability of English law on the colonies. Thus this storehouse of English law stood open to our leaders in crafting our own structure.

MAGNA CARTA

Many of the provisions of the Bill of Rights trace their origins to Magna Carta, the Great Charter forced on a reluctant King John by his barons in 1215. Appeals to the authority of Magna Carta figured prominently in seventeenth century England during the struggles between Parliament and the King. Thus Magna Carta was a living document during the formative years of the American colonies. Colonial charters that guaranteed Magna Carta would follow settlers into the wilderness held important inducement. Magna Carta's concept that individual freedom should be protected, even against the sovereign - and in the sovereign's own courts - underlies the very idea of a Bill of Rights. One of the four chapters of Magna Carta still in force in England today sounds familiar to American ears:

"No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right." (Halsbury's Statutes of England and Wales, Magna Carta, Ch. 29, 4th Ed. (1985) pp. 14-17).

ENGLAND'S BILL OF RIGHTS OF 1689

When William and Mary were invited to take the throne of England after the Glorious Revolution of 1688, it was on condition that they agree to a Declaration of Rights, which became

England's Bill of Rights upon adoption by Parliament and signing by the King December 16, 1689.

The thirteen declarations of the English Bill of Rights provided the model for similar lists in our new state Constitutions following the Revolutionary War and in the Federal Bill of Rights. Those declarations were:

"1. The pretended power of suspending of Laws or the execution of Laws by Regal Authority without Consent of Parliament is illegal.

2. The pretended power of dispensing with laws or the Execution of laws by regal authority as it has been assumed and exercised of late is illegal.

3. The Commission for erecting the late Court of Commissioners for Ecclesiastical Causes and all other Commissions and Courts of like nature are illegal and pernicious.

4. Levying of money for or to the use of the Crown by pretence of Prerogative without Grant of Parliament for longer time or in other manner, than the same is or shall be granted in illegal.

5. It is the right of the subjects to petition the King and all Commitments and prosecutions for such petitioning are illegal.

6. The raising or keeping a Standing Army within the Kingdom in time of Peace unless it be with consent of Parliament is against Law.

7. The Subjects which are Protestants may have Arms for their defence Suitable to their Condition and as allowed by Law.

8. Elections of Members of Parliament ought to be free.

9. The freedom of Speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

10. Excessive Bail ought not to be required nor excessive fines imposed nor cruel and unusual Punishments inflicted.

11. Jurors ought to be duly impanelled and returned and Jurors which passe upon men in trials for high Treason ought to be freeholders.

12. All grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. For redress of all grievances and for the amending, strengthening and preserving of the Laws, Parliaments ought to be held frequently." The Declaration of Rights, 1689, Lois G. Schwoerer, copyright 1981, pp. 296-297 (spelling modernized).

The English Bill of Rights clearly provides the core and concept of many of our own protections. Here is the grandparent of our Bill of Rights, and the parent is to be found in the state Constitutions crafted after the Revolutionary War.

PENNSYLVANIA, 1787: THE FIRST DRAFT BILL OF RIGHTS

Why was a similar list left out of our Constitution? Its inclusion was debated in Philadelphia in 1787. Convention delegate Col. Mason "wished the [Constitution] had been prefaced with a Bill of Rights & would second a Motion if made for the purpose. It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours."

But most Convention delegates disagreed: The Federal Government was conceived as a body of limited power and the protection for individual rights was contained in the various state Constitutions. Repetition in the Federal document was unneeded.

The writers of the Constitution soon found just how wrong they were. Without an agreement to promptly enact a Bill of Rights, the Constitution would probably not have been ratified.

During the Constitutional ratification fight in Pennsylvania, the anti-Federalists proposed articles which "might either be taken collectively as a bill of rights or separately as amendments", and moved that no vote be taken by the State Convention on the Constitution until such amendments had been made. This attempt to derail ratification failed, but the fifteen articles so proposed were widely circulated as the "Dissent of the Minority of the Convention" of Pennsylvania. They provided that:

1. The rights of conscience shall be held inviolable, and neither the legislative, executive, nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion.

2. That in controversies respecting property, and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, as in those of the several states.

3. That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation, as well in the federal courts, as in those of the several states; to be

heard by himself or his counsel; to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial, by an impartial jury of the vicinage, without whose unanimous consent, he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

4. That excessive bail ought not to be required nor excessive fines imposed, nor cruel or unusual punishments inflicted.

5. That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.

6. That the people have a right to the freedom of speech, of writing, and of publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States.

7. That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict

subordination to and be governed by the civil power.

8. The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.

9. That no law shall be passed to restrain the legislatures of the several states, from enacting laws for imposing taxes, except imposts and duties on goods exported and imported, and that no taxes, except imposts and duties upon goods imported and exported, and postage on letters shall be levied by the authority of Congress.

10. That elections shall remain free, that the House of Representatives be properly increased in number and that the several states shall have power to regulate the elections for Senators and Representatives, without being controlled either directly or indirectly by any interference on the part of Congress, and that elections of Representatives be annual.

11. That the power of organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state and for such length of time only as such state shall agree.

12. That the legislative, executive, and judicial powers be

kept separate, and to this end, that a constitutional council be appointed to advise and assist the President, who shall be responsible for the advice they give (hereby, the Senators would be relieved from almost constant attendance); and also that the judges be made completely independent.

13. That no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed or made conformable to such treaty, neither shall any treaties be valid which are contradictory to the Constitution of the United States, or the constitutions of the individual states.

14. That the judiciary power of the United States shall be confined to cases affecting ambassadors, other public ministers and consuls, to cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more states - between citizens claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, and in criminal cases, to such only as are expressly enumerated in the Constitution, and that the United States in Congress assembled shall not have power to enact laws, which shall alter the laws of descents and distributions of the effects of deceased persons, the title of lands or goods, or the regulation of contracts in the individual states.

15. That the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction and

right which is not by this Constitution expressly delegated to the United States in Congress assembled. Ratification of the Constitution by the States: Pennsylvania, Ed. by Merrill Jensen, 1976, pp. 597-599; 623-625.

This was the first draft of the Bill of Rights.

THE WORK IS FINISHED

On August 24, 1789, a series of seventeen articles were sent by the House of Representatives to the Senate for concurrence and distribution to the states. This marked a further stage in the evolution of our Bill of Rights. A much pruned down list of twelve articles was submitted to the states. The first two Amendments submitted to the states concerned the numbers and apportionment of Congress and the compensation of Representatives and Senators. These were out of place in a series of guarantees of individual rights, and attention focused on the remaining ten.

The decision had long before been made that we must have a series of Amendments protecting these rights. Their adoption was widely taken for granted and few seemed to be particularly interested in the actual process of adoption. It took a leisurely two years: On December 15, 1791, adoption by Virginia actually made the Bill of Rights effective for the entire nation.

After their adoption was a reality, they played little part in the actual litigation before the Courts until the Civil Rights movement of the 1950's. We who see cases involving the Bill of Rights in every morning's newspaper can hardly understand this

long sleep. When George S. Boutwell wrote his compendium on The Constitution of the United States at the End of the First Century (1891), he could fill 354 pages with case summaries on the Articles of the Constitution but could only record twenty-five pages for the entire Bill of Rights. This quiescence, though, is not unprecedented: The Magna Carta had been almost ignored for two centuries before becoming the center of debate in the early 1600's.

As we watch the imposing edifice that has become the Bill of Rights today, and see various decisions changing its moldings, trimming or extending this room or that, we can still discern the hidden beams and rafters that both link the Bill of Rights with ages past and give it strength to face the ages yet to come.